*THE HONOURABLE SRI JUSTICE V.V.S.RAO

+WRIT PETITION No.19925 OF 2005

%30-09-2005

Central Bank of India, Kakinada.

..PETITIONER

Vs.

$ State of Andhra Pradesh, rep.by its Secretary, Industries & Commerce (Sugar) Dept., Secretariat, Hyderabad and others

..RESPONDENTS

! COUNSEL FOR PETITIONERS : SRI K.Subrahmanya Reddy

^ COUNSEL FOR RESPONDENTS 1 TO 4: G.P. FOR INDUSTRIES & COMMERCE

^ COUNSEL FOR RESPONDENT 5: SRI V.V.N.NARAYANA RAO

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>HEAD NOTE:

?CASES REFERRED:

1. AIR 1971 SC 1210
2. 1983 (2) APLJ 127
3. AIR 1988 AP 18
4. (2000) 4 SCC 406 = AIR 2000 SC 1535
5. (2004) 4 SCC 311

THE HON'BLE SRI JUSTICE V.V.S.RAO

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WRIT PETITION NO.19925 OF 2005

ORDER:

The petitioner is a nationalized bank. It is aggrieved by the public auction notice dated 02.09.2005 issued by the third respondent. By the said auction notice, the third respondent proposed to conduct public auction to sell away two items of immovable/movable properties belonging to fifth respondent for realising sugarcane dues payable to farmers and arrears of purchase tax to Government. Be it noted that the respondent is taking action in accordance with the provisions of A.P.Revenue Recovery Act, 1864 (for short, Revenue Recovery Act).

The case of the petitioner bank in brief is as follows. M/s.Kirlampudi Sugar Mills Limited (KSML), fifth respondent herein, availed cash credit limit and term loans from Kakinada branch of the petitioner bank. To secure the loan, KSML allegedly hypothecated the plant and machinery of its factory and created equitable mortgage by deposit of title deeds in respect of agricultural lands admeasuring Acs.43.08 in

Survey Nos.565, 566, 629, 630, 631, 633 and 663 situated at Pithapuram of East Godavari District. As per the writ affidavit averment, as on 31.08.2005, KSML owes a sum of Rs.392.37 lakhs to the petitioner bank. It appears earlier when a news item appeared in May, 2005 that the Government is proposing to proceed against the properties of KSML for realizing the sugarcane dues, the Senior Manager of Kakinada Branch of petitioner bank addressed a letter to the District Collector, East Godavari District, on 25.05.2005 claiming priority of debt over the mortgage properties. In spite of the same, the third respondent issued public auction notice dated 02.09.2005 proposing to sell the lands admeasuring Acs.12.96 and constructed portion of Acs.1.00 in Survey Nos.633 of Pithapuram. The petitioner contends that if the auction is conducted, being secured creditor the petitioner would be deprived of its right to recover the loan amount sanctioned and disbursed to KSML. The bank therefore prays for declaration that the action of the respondents 3 and 4 in conducting auction pursuant to impugned notification is arbitrary, illegal and contrary to law and for a consequential direction to respondents 1 to 4 not to proceed against the properties of KSML allegedly mortgaged to the petitioner bank.

The matter initially was listed for preliminary hearing on 09.09.2005. This Court after hearing the learned Standing Counsel for Central Bank, on *prima facie* consideration observed that in spite of the availability of effective, efficacious and alternative remedies under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act, for brevity) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Securitisation Act, for brevity), the petitioner bank approached the High Court under Article 226 of Constitution of India for enforcing its security by filing writ petition which is not maintainable. The learned Standing Counsel sought time to examine this question. The matter again came up on 12.09.2005, 14.09.2005 and 15.09.2005. Sri K.Subrahmanya Reddy, learned Senior Counsel appeared for the petitioner bank and made elaborate submissions. Though a counter affidavit is not filed on the preliminary question, the learned Government Pleader Mr.Panduranga Reddy made submissions after obtaining necessary instructions from respondents 1 to 4.

Learned Senior Counsel appearing for Central Bank submits that though the bank has remedy under RDB Act for recovery of the loan amount, the Cane Commissioner or Assistant Cane Commissioner are not debtors within the meaning of Section 2(g) of RDB Act and therefore the bank has not filed any original application before the Debts Recovery Tribunal (DRT, for brevity). He would place reliance on Section 18 of the RDB Act in support of the submission that the jurisdiction of this Court under Articles 226 and 227 of Constitution of India is not barred. Secondly, he would urge that under the provisions of RDB Act and Securitisation Act, the debt due to a bank and/or financial institution has priority of debt and therefore ignoring the mortgage of the bank, the respondents cannot sell the hypotheca under the provisions of Revenue Recovery Act. He placed reliance on **Bank of Bihar v State of Bihar, Punjab National Bank v Challapalli Sugars Limited, State of A.P., v Andhra Bank Limited** and **Allahabad Bank v Canara Bank.** Nextly, he would urge that under the provisions of A.P.Sugarcane

(Regulation of Supply and Purchase) Act, 1961 (Sugarcane Act, for brevity) and A.P.Sugarcane (Regulation of Supply and Purchase) Rules, 1961 (Sugarcane Rules), the arrears of sugarcane price due to cane growers can be realized only by enforcing a claim against 65 per cent on the sugar produced and the Cane Commissioner has no power or authority to proceed against the movable/ immovable properties given as security for the loan advanced by a financial institution.

The learned Government Pleader submits that adequate opportunity was given to KSML to clear off cane growers' arrears and purchase tax arrears but they were not paid. Though the present management gave cheques, they were returned by the bank. Therefore, as a last resort as required under Law, the Assistant Cane Commissioner has issued the auction notice to bring the properties of the sale for realization of the cane price arrears and purchase tax arrears. He would submit that Section 19(4) of Sugarcane Act and Rule 39-A of Sugarcane Rules is not a bar for proceeding under the Revenue Recovery Act. He placed reliance on Section 19(2A) as amended/inserted by A.P.Sugarcane (Regulation of Supply and Purchase) Amendment Act, 1976 (Amendment Act, for brevity) and Rule 39-B of the Sugarcane Rules which was inserted by subsequent amendment made to the Rules vide G.O.Ms.No.382 dated 19.06.2000.

The point that arises for consideration at the preliminary stage of hearing is whether a writ petition by a secured creditor/a nationalised bank for restraining the Government from realising sugarcane arrears and purchase tax arrears, is maintainable under Article 226 of Constitution of India.

In **Mardia Chemicals Limited v Union of India**, a Division Bench of the Supreme Court upheld the Securitisation Act as constitutionally valid. Their Lordships traced the history behind Parliament enacting RDB Act and Securitisation Act, which was pursuant to a report submitted by an expert body – Narasimham Committee. In paragraphs 34 and 35, the Supreme Court traced this history. Dealing with the contention that it was not proper to enact Securitisation Act in the prevailing background (before Securitisation Act), apex Court observed as under.

> One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the Court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by
> Mr Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting

dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy.

In **Allahabad Bank v. Canara Bank** (supra), the Supreme Court considered question whether for initiation of various proceedings by the banks and financial institutions under the RDB Act, leave of the company Court is necessary under Sections 446(1) or 537 of the Companies Act, 1956 before a winding up order is passed against the company or before a provisional liquidator is appointed. The question whether in respect of proceedings under the RDB Act, at the stage of adjudication under Section 19 of the RDB Act and at the stage of execution of recovery certificate, the Tribunal or Recovery Officer are conferred exclusive jurisdiction was also considered. The Supreme Court ruled that at the stage of adjudication or execution, the provisions of RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of the debts payable to the banks and financial institutions and that there can be no interference by the company Court under Section 442 read with Section 537 or under Section 446 (1) of the Companies Act. It was also held that even in regard to execution, the jurisdiction of the Recovery Officer is exclusive. In paragraph 37 of the above judgment, the apex Court laid down:

Even in regard to 'priorities' among creditors, the said Committee stated in Annexure I as follows:

> "The Adjudication Officer will have such power to distribute the sale proceeds to the Banks and Financial Institutions being secured creditors, in accordance with inter-se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priorities in the law."

The above recommendations as to working out 'priorities' have now been brought into the Act with greater clarity under Section 19(19) of Ordinance 1/ 2000. Priorities, so far as the amounts realised under the RDB Act are concerned, are to be worked out only by the Tribunal under the RDB Act. Section 19(19) of the RDB Act reads as follows:

> "Where a certificate of recovery is issued against a company registered under the Companies Act, 1956, the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529A of the Companies Act, 1956 and to pay the surplus, if any, to the Company."

Section 19(19) is clearly inconsistent with Section 446 and other provisions of the Companies Act. Only Section 529A is attracted to proceedings before the Tribunal. Thus, on questions of adjudication, execution and working out priorities, the special provisions made in the RDB Act have to be applied.

Under Securitisation Act, “secured creditor” means any bank or financial institution or any consortium or group of banks or financial institutions including other such classes of financial institutions (See Section 2(zd)). Chapter III of the Securitisation Act provides for enforcement of “security interest”, which as per Section 2(zf) means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation and assignment. Chapter III of Securitisation Act (Sections 13 to 19) contain provisions enabling a secured creditor to enforce security interest. When a borrower makes any default in repayment of secured debt, the secured creditor may classify it as non-performing asset (NPA) and may require the borrower by notice to discharge the liabilities within sixty days from the date of the notice. As per sub-section (4) of Section 13 of Securitisation Act, if the borrower fails to discharge his liability within sixty days, it shall be open to the secured creditor to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset, or take over the management or appoint any person to manage the secured assets, or require at any time by notice in writing, any person who has acquired any of the secured assets from the borrowers to pay so much of the money as is sufficient to pay the secured debt. Section 35 of the Securitisation Act gives overriding effect. It may also be noticed that as contemplated in Section 37, the Securitisation Act shall be in addition to, and not in derogation of the Companies Act, 1956; Securities and Exchange Board of India (SEBI) Act, 1992; RDB Act and Securities Contracts (Regulation) Act, 1956 or any other law for the time being in force.

A reading of the provisions of RDB Act and Securitisation Act and the two decisions of the Supreme Court in **Allahabad Bank v Canara Bank** (supra) and **Mardia Chemicals Limited v Union of India** (supra) would show that any bank like the petitioner is given ample right not only under the provisions of these two Acts, also under the provisions of various other enactments referred to in Section 37 of the Securitisation Act to proceed against a borrower for realization of a secured debt. In this case, admittedly the petitioner bank has not availed any of the remedies and did not even issue a notice under Section 13(2) of the Securitistaion Act. By initiating any action under any of the enactments, it was open to the petitioner bank to obtain appropriate orders for keeping their security intact. For reasons best known to them, the petitioner bank has not availed any of these remedies. Can it be permitted to enforce its right under Article 226 of Constitution of India when it has on its volition has not availed any of the remedies available under RDB Act and other enactments. The answer should be in the negative. The petitioner bank cannot maintain this writ petition. Indeed, it is not denied that the petitioner bank earlier filed a writ petition being W.P.No.25959 of 1999 before this Court challenging auction notice dated 25.11.1999 issued by Assistant Cane Commissioner, which was later withdrawn. Then the petitioner bank filed original application being O.A.No.267 of 2000 before DRT, Hyderabad, and obtained a recovery certificate against KSML. No reason is forthcoming from the petitioner as to why similar O.A., could not be filed by them when in which they could have obtained appropriate orders.

The other decisions cited by the learned counsel for the petitioner are those cases

which arose out of suits filed by the financial institutions or against it in which the banks claimed priority of debt under common law and/or the contract between the bank and the borrower. They are of no assistance to the petitioner in this case. These decisions might be of some assistance to the petitioner bank when they file an appropriate application before DRT and claim priority of debt and a lion's share as and when such situation arises.

Section 19(2-A) of Sugarcane Act lays down that the price of the cane remaining unpaid on the expiration of the period of fourteen days from the date of such delivery (as per Section 19(2)) shall be recovered as an arrear of land revenue with interest at fifteen per cent from the date of delivery. Under Section 21(3) as amended by the Amendment Act, any sum due to the Government towards purchase tax shall be a first charge on the sugar produced out of cane already subject to purchase tax. As per sub-section (6) of Section 21, if the tax is not paid with interest by the sugar mill within the prescribed time, it shall be recoverable as an arrear of land revenue. The submission that sub-section (4) of Section 19 of Sugarcane Act and Rule 39-A of Sugarcane Rules create a charge only on the sugar produced for recovery of cane growers arrears is misconceived. Sub-section (4) of Section 19 itself begins with words "without prejudice to the provisions of the foregoing sub-sections". It only means that when the price of the cane delivered is not paid, it shall be open to the competent authorities either to initiate action under Revenue Recovery Act and/or proceed to recover the sugarcane price by sale of sixty five per cent of sugar produced from out of sugarcane. Be it noted that the Sugarcane Act received the assent of the President on 23.12.1961 and therefore under Article 254(2) of Constitution of India, the provisions of Sugarcane Act should be given an overriding effect over the provisions of other enactments made by the Parliament. This legal position is well settled. Therefore, the submission of the learned counsel for the petitioner is rejected.

The submission of the learned Senior Counsel with reference to Section 18 of the RDB Act is also without any substance. Sections 17 and 18 of RDB Act read as under.

17. Jurisdiction, powers and authority of Tribunals:-

1. A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

2. An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

18. Bar of Jurisdiction:-

On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226

and 227 of the Constitution) in relation to the matters specified in Section 17.

In **Allahabad Bank v Canara Bank** (supra), the Supreme Court after referring to above two provisions and held that it is for the Tribunal to decide the applications of the banks for recovery of debts due to them and the definition of 'debt' in Section 2(g) of RDB Act includes 'claims' by banks and the liability incurred under a decree or otherwise. After referring to Sections 19 and 31 also, the Supreme Court observed as under.

> In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to banks or financial institutions. Once the Tribunal passes an order that the debt is due, the Tribunal has to issue a certificate under Section 19(22) [formerly under Section 19(7)] to the Recovery Officer for recovery of the debt specified in the certificate. The question arises as to the meaning of the word "recovery" in Section 17 of the Ac/t. It appears to us that basically the Tribunal is to adjudicate the liability of the defendant and then it has to issue a certificate under Section 19(22). **Under Section 18, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Articles 226 of 227 of the Constitution.) This is the effect of Sections 17 and 18 of the Act… We hold that the provisions of Sections 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of the liability of the defendant to the appellant Bank is concerned.**
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> (emphasis supplied)

Therefore, it stands concluded by the above decision that the jurisdiction of this Court under Articles 226 and 227 of Constitution of India is not barred in relation to the exercise of the jurisdiction, power and authority by the DRT in respect of the matters specified in Section 17 of the RDB Act. It only means that if a bank/financial institution approaches the DRT under Section 19(1) of the RDB Act and DRT exercises jurisdictional power or authority under Section 17, in appropriate matters the jurisdiction of this Court under Article 226 of Constitution of India is saved. A harmonious reading of Sections 17 and 18 of the RDB Act would show that it is only in relation to the matters specified in Section 17, Section 18 does not bar the jurisdiction of this Court under Article 226 of Constitution of India subject to other principles of law. In this case, the petitioner bank admittedly has not approached the DRT and straightaway approached this Court. Therefore, the writ petition cannot be entertained even as per Section 18 of the RDB Act. If so advised, it shall be open to the petitioner bank to approach the concerned DRT and/or to initiate action under Securitisation Act. In this context, it may also be noticed that under Section 73 of the Transfer of Property Act, 1882, the mortgagee would not have any priority over the dues of public nature and when the mortgaged properties are brought to sale by public authorities for realizing the debts of public nature, the mortgagee has a right to

claim residue of sale proceeds. This Court, however, hastens to add that such a question has to be decided before appropriate legal forum and a writ petition is not a proper remedy.

The writ petition, for the above reasons, is not maintainable. All questions raised by the petitioner bank are left open notwithstanding the *prima facie* observations and findings hereinabove. All questions have to be decided in accordance with the evidence that may be produced before appropriate legal forum. The writ petition is accordingly dismissed.

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(V.V.S.RAO,J)

.09.2005.

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Note: LR copy be marked.

(By order)

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To

One fair copy to the Hon'ble Mr.Justice V.V.S.Rao (for his Lordships kind perusal)

1. The Secretary, Industries & Commerce (Sugar) Department, Secretariat Buildings, Secretariat, Hyderabad.

2. The Director of Sugar & Cane Commissioner, Andhra Pradesh, Hyderabad.

3. The Assistant Cane Commissioner, Samalkot, East Godavari District.

4. The District Collector, Kakinada, East Godavari District.

5. 8 LR copies.

6. Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.

7. The Secretary, A.P.Advocates Association Library, High Court Buildings, Hyderabad.

8. 2 CCs to the G.P. for Industries & Commerce, High Court Buildings, Hyderabad (OUT).

9. 2 CD copies.